

ROB BLEIL
Environmental Spec Sr - ES
The Williams Companies, Inc.
Exploration & Production
1058 County RD #215
Parachute, CO 81635
rob.bleil@williams.com



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Sent Via Email to:
nepataskforce@mail.house.gov

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C.

RE: Comments regarding the initial findings and recommendations of the Task Force on Improving the National Environmental Policy Act and the Task Force on Updating the National Environmental Policy Act.

Dear Sir or Madam:

On behalf of Williams Production RMT Company ("Williams"), we appreciate the opportunity to provide comments to the recommendations for improving and updating the National Environmental Policy Act ("NEPA"). At your request, we are structuring our comments so that they address specific recommendations made by the Task Force. We have not commented on every recommendation, only those with which we disagree or believe additional comment is necessary. Our comments are set forth below in the order presented in the Task Force's December 21, 2005 Initial Findings and Draft Recommendations.

In drafting comments to the NEPA Task Force recommendations, Williams' primary concern is to address the issues it has encountered with the implementation of NEPA by the BLM in regulating oil and gas development. The comments provided below focus on NEPA implementation in that context. In that vein, it should be noted that the President and Congress have recognized the importance of expediting the NEPA process for the development of domestic energy resources. The President expressed his concern in Executive Order 13212, which requires federal agencies to "expedite their review of permits or take other actions as necessary to accelerate the completion of [energy-related] projects while maintaining safety, public health, and environmental protections." Executive Order 13212 at Sec. 2 (May 18, 2001). In passing the Energy Policy Act of 2005, Congress stated that "the widening gap between supply and demand, accompanied by reliance on foreign sources to close that gap, has created profound concerns in the Congress over the Nation's energy security." S. REP. NO. 109-78, at 6 (2005) (Background and Need). The energy policy embodied in the Act was "necessary to ensure the country's continued growth and prosperity and to

protect our national security." *Id.* That policy includes expedited review for oil and gas activity, as evidenced by the implementation of five new categorical exclusions from the NEPA process. Clearly, the importance of reducing delays in the NEPA process is of paramount concern, and Williams encourages any recommendation of the Task Force that is designed to expedite the permitting process.

Group 1 - Addressing Delays in the Process

Recommendation 1.1: Amend NEPA to define "major federal action."

The problem with NEPA is not how it is written. The problem is implementation of NEPA as written. Implementation across BLM district and state offices varies depending on the interpretation of NEPA adopted by BLM employees. Rather than add and re-write definitions, internal guidance and training to implement such guidance may provide a better approach to achieving consistency in NEPA implementation.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS).

Williams supports efforts like the BLM's new proposed rules described in the January 25, 2006 *Federal Register*. As a means of clarifying CEs, EAs, and EISs, the BLM's proposed rules set forth "Actions Typically Requiring an Environmental Assessment (EA)," "Major Actions Normally Requiring an EIS," and "Categorical Exclusions." Combined with additional staff training described in Williams' comments to Recommendation 1.1 above, the NEPA Task Forces' goal to encourage the appropriate use of CEs, EAs, and EISs can be achieved through proposed agency rule changes and modifications without a major overhaul of the NEPA statutes.

Additionally, in order to simplify the NEPA process and decrease confusion, the federal agencies should be allowed to explore and develop additional categorical exclusions that make sense based on years of experience with NEPA compliance. For instance, the Forest Service is proposing categorical exclusions for forest plans, plan amendments, and plan revisions as they do not have major environmental impacts. Also, Section 390 of the Energy Policy Act of 2005 established five new NEPA categorical exclusions to promote and facilitate oil and gas production on public lands.

Moreover, if the goal is to reduce unnecessary and duplicative environmental analysis, additional agency training concerning proper evaluation and use of DNAs (Determination of NEPA Adequacy) would be helpful to assist the federal agency in determining whether existing NEPA documents show the agency took a "hard look" at whether new circumstances, new information, or environmental impacts not previously anticipated or analyzed warrant new analysis or supplementation of the existing NEPA

documentation, and whether the impacts of the proposed action were considered in prior analyses.

Finally, regarding process, Williams has in some cases experienced difficulty in obtaining copies of final NEPA documents approving oil and gas activities. When all environmental review is complete and the NEPA documentation has been finalized, Williams recommends that BLM and other federal agencies post all final NEPA documentation to websites after appropriately redacting certain details to address energy infrastructure security concerns.

Group 2 – Enhancing Public Participation

Recommendation 2.1: Direct CEO to prepare regulations giving weight to localized comments.

Currently, there are outlets for public comment and input into the NEPA process. The federal agency should not be hamstrung in its decision-making role by mandating that local comments be given more weight than comments from industry and other groups. Each group should be given a fair opportunity to comment on the NEPA process and the decision should be left to the federal agency to determine the outcome based on the information in hand, the scope of the project, and what the agency determines to be in the public interest as a whole.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 C.F.R. § 1502.7.

If the EIS page limits are to be codified, consideration should also be given to codifying the CEQ's guidance in the *Forty Most Asked Questions* regarding EA page limits. The Council has generally advised that EAs should not be more than 10 to 15 pages, except in cases in which a proposal is so complex that a concise document is not appropriate. With the increased litigation over the adequacy of EAs, more extensive and comprehensive EAs are being prepared. In fact, some of the EAs are large enough in scope and number of pages to qualify as an EIS. It seems we have gotten away from the original purpose of an EA in order to avoid potential litigation. The goal of NEPA should be to ensure the agency took a "hard look" at the potential environmental impacts of the proposed action. NEPA analysis and decision making should not be guided with an eye toward avoidance of litigation at all costs.

Group 3 – Better Involvement for State, Local and Tribal Stakeholders

Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status.

BLM's regulations already address granting cooperating agency status in appropriate circumstances. In any event, local stakeholders without special expertise should not be granted cooperating agency status.

Recommendation 3.2: Direct CEO to prepare regulations that allow existing state environmental review process[es] to satisfy NEPA requirements.

To the extent state regulatory agency approval or permitting is required in order to proceed with a project, duplicative environmental impact analysis required by NEPA should be eliminated. The court in *Wyoming Outdoor Council v. United States Army Corps of Engineers*, 351 F. Supp. 2d 1232 (D. Wyo. 2005) adopted this view. There, the Corps of Engineers was deemed to have considered the impacts on water quality from its issuance of a dredge-and-fill permit associated with development of coalbed methane gas, the production of which required release of large amounts of subsurface water on the surface. *Id.* at 1243-1244. The court held that the Corps' reliance on the Wyoming Department of Environmental Quality's ("WDEQ") water quality certification as evidence that impacts to water quality had been considered was not arbitrary and capricious given that the Corps had no authority to permit or forbid the discharge of produced water in Wyoming and special conditions were imposed by WDEQ on discharges of the water, which effectively ameliorated any concern that impacts on water quality would be significant. *Id.* at 1244. Thus, as long as the environmental impacts of a proposed project are considered, it should not matter whether the analysis is completed under the state review process or NEPA's requirements.

In the context of oil and gas development, BLM along with numerous other federal agencies, has recognized the importance of eliminating duplicative regulation between federal and state agencies. Memorandum of Understanding, Implementation of Section 365 of the Energy Policy Act of 2005, at IV.A. (Oct. 2005). With the goal of streamlining the oil and gas development approval process, including NEPA review, the agencies are determined to work together to coordinate responsibilities and reduce redundancies. *Id.*

Overlapping regulations seem even more onerous on split estates where compliance with both state environmental review and NEPA's requirements necessitate duplication of efforts resulting in wasted time and money. While BLM's obligation to comply with NEPA extends to authorizing lease operations on split estates, the reality is that BLM does not manage the privately owned surface. Because BLM has limited authority in choosing alternatives for private surface use, the purpose of NEPA, which is to inform the decision-making of the agency in choosing between alternatives, is obviated. BLM's authority to impose surface use restrictions is limited to those environmental statutes such as the Endangered Species Act, Clean Water Act, and Clean Air Act that would apply regardless of surface ownership and NEPA does not give BLM

authority to require a private surface owner to take action to protect other environmental or cultural resource values.

While Williams does not disagree that BLM must comply with NEPA before authorizing activity on split estates, it should be recognized that the utility of NEPA compliance is limited. State regulatory agencies (e.g. state oil and gas conservation commissions, state environmental quality divisions, etc.) have jurisdiction and authority to impose their requirements on private surface and state surface which may duplicate the analyses and objectives of NEPA. Duplicative regulation of split estates can engender confusion, make compliance difficult, or create delay. Thus, to the extent cross over and duplication of effort can be eliminated to streamline the analyses of environmental impacts, Williams would support such efforts.

Group 4 – Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision.

If NEPA is to contain a citizen suit provision, clear guidelines must be established to address who may challenge an agency decision. Additionally, appellants should be required to adhere to strict requirements in order to pursue an appeal. The last thing the NEPA process needs is to

Moreover, perhaps dispute resolution procedures which facilitate negotiations between the parties could be established to determine whether the issues can be resolved through the mediation process before turning to litigation. If the parties are afforded an opportunity to resolve the issues before launching an appeal, this may reduce the time and costs associated with litigating appeals to the IBLA and beyond.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre clear” projects.

Allowing the CEQ to become a clearinghouse for monitoring court decisions affecting procedural aspects of preparing NEPA documents would result in a “bottleneck” situation. Analyzing the effects of court and administrative decisions takes time. Additionally, reaching internal consensus as to policies for implementing these decisions may take months, or even years. Thus, Williams would oppose such a plan to the extent it would result in unacceptable delays to the NEPA process. In the event such a plan were instituted, Williams recommends that it be made abundantly clear that any position taken by the CEQ is merely advisory. Agencies should be free to disagree with the CEQ’s interpretation of the case law.

Group 5 – Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible.

The CEQ has already provided guidance on the scope of alternatives to be included in NEPA documents and there is no need to amend NEPA. Adding the requirement that alternatives be economically and technically feasible merely opens the door to what may amount to varied and inconsistent interpretations of what is "economically and technically feasible." Will this requirement mandate that the project proponent conduct a study on the feasibility of each alternative, adding additional cost and delay to the NEPA process? Rather than amending NEPA, Williams suggests that additional guidelines from the CEQ or BLM addressing "reasonableness" would be sufficient to provide certainty to the choice of alternatives. In particular, Williams suggests that such guidance limit the alternatives analysis in NEPA documents considering the approval of APDs on split estates where BLM's authority to control surface use is limited.

Recommendation 5.3: Direct CEO to promulgate regulations to make mitigation proposals mandatory.

Williams opposes making mitigation proposals mandatory. First, it should be noted that often project proponents will include voluntary mitigation in a proposal to reduce the level of significance of the project such that an EA, rather than an EIS, is appropriate. These voluntarily imposed mitigation measures need not be mandated by the agency. When, however, an EIS is prepared for a project with significant impacts, it is well settled, that BLM cannot impose mandatory mitigation measures, though many project proponents voluntarily engage in best management practices and implement mitigation in order to be good stewards of public resources. The bottom line is that NEPA is a procedural statute intended to inform the decision-making of the agency. It is not a substantive statute. That is not to say that environmental and cultural resource values are unprotected. A plethora of environmental laws protect such resources, including the Endangered Species Act, Clean Water Act, Clean Air Act. Adding authority to mandate mitigation would convert NEPA into a substantive statute, which would hinder the efforts of the Task Force to reduce duplicative regulation.

Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEO to promulgate regulations to encourage more consultation with stakeholders.

The current NEPA regulations allow for the appropriate amount of public input and involvement. The federal agency should be allowed to work through the NEPA process in a timely manner such that its decision-making is not further delayed by

required consultation and negotiation with "stakeholders." If in fact, the Task Force decides to implement this recommendation, Williams would encourage the term "stakeholder" to be narrowly defined as to prevent delay and obstruction of the NEPA process.

Further, Williams has been concerned by the practice of some BLM offices to extend the public comment period on a project numerous times to accommodate the late filing of comments by opposition groups. The time frame set forth in the scoping process for EAs and EISs should be adhered to with limited exception. While comments filed on the last day of the comment period should be considered, the comment period should not be repeatedly extended to permit additional comment on issues raised at the last minute. Often the public has had an opportunity at various stages of oil and gas development to comment, including during the RMP process, leasing stage, and APD stage. If BLM has instituted a deadline for comment, it should be firm. Once it passes, BLM should expedite its responses to the comments and issue the final NEPA document.

Group 7 – Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within the CEQ.

Williams believes a "NEPA Ombudsman" position should be created at the BLM state level, rather than within the CEQ. Often times disagreements occur at a more local level between the BLM field office and the operators concerning application and interpretation of NEPA's requirements. It would be beneficial if clarification and guidance could be given at a state level such that all of the field offices are implementing NEPA consistently across the board. Additionally, an ombudsman at the state level would ensure these issues were resolved in a more timely fashion.

In addition to providing a NEPA ombudsman within each BLM state office, Williams recommends collaboration between NEPA coordinators in the various BLM field offices and the NEPA ombudsman. While not every field office has a designated NEPA coordinator, those that do should take a more active role in training staff involved in the NEPA process and implementing the guidance provided by the state NEPA ombudsman. The various NEPA coordinators and the NEPA ombudsman should also work together to identify areas where training tailored to the particular needs of applicants in that state might be useful. For example, training designed to address oil and gas activities, specifically identifying categorical exclusions and guidance on conducting an appropriate tiering analysis, would benefit BLM employees in numerous field offices. Appropriate training would improve knowledge among the agency staff and ensure consistency in application of NEPA requirements.

Group 9 – Studies

Recommendation 9.1: CEO study of NEPA's interaction with other Federal environmental laws.

Williams supports a study examining the overlap and jurisdictional intricacies of NEPA as it interacts with other environmental laws. As noted previously, NEPA is a procedural, not a substantive, statute. Nevertheless, NEPA is often the trigger that brings to bear the full weight of environmental laws such as the Endangered Species Act and Clean Water Act. BLM, however, as the agency considering the impacts of a proposed action in the NEPA process, does not have primary jurisdiction to enforce the mandates of those other environmental laws. The Fish and Wildlife Service is primarily responsible for enforcing the strictures of the Endangered Species Act and state regulatory bodies, the Environmental Protection Agency, or the Corps of Engineers enforce the Clean Water Act. The role of BLM, as the lead agency, is to consider the impacts of the proposed action, not issue incidental take permits or statements under the Endangered Species Act or discharge permits under the Clean Water Act. A study that could identify the overlaps in jurisdiction and set forth guidelines for the NEPA action agency in relation to the responsibilities imposed by other environmental laws would be useful.

In the context of split estates, a study in the interaction of NEPA with other environmental laws is critical. As noted in the comment to Recommendation 3.2, the intent of NEPA, to inform the agency's decision between various alternatives, is obviated by the limited alternatives available to the agency when the surface is privately owned. In contrast to oil and gas activity on federal land, which is managed for multiple uses, the use of the private surface cannot be dictated by the agency. Furthermore, the environmental laws mentioned above, such as the Endangered Species Act and Clean Water Act apply to the private surface independent of oil and gas development. There is little added value in preparing a NEPA document when the agency has limited ability to control alternatives to the proposed action. Therefore, Williams recommends that a study of the interaction between NEPA and other federal environmental laws pay special attention to application of such laws on split estates.

Recommendation 9.2: CEO Study of current Federal agency NEPA staffing issues.

While adding staff under the pilot program mandated by the Energy Policy Act of 2005 will be beneficial, it is essential that all staff handling the NEPA process be sufficiently trained. Moreover, consistency in the approaches taken by various BLM field offices in leasing and permitting oil and gas development is crucial, as recognized in the October 2005 Memorandum of Understanding between BLM and various other federal agencies. Memorandum of Understanding, Implementation of Section 365 of the Energy Policy Act of 2005, at IV.A. (Oct. 2005). Variations between field offices in the application of procedures required to accomplish leasing and approval of oil and

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gas drilling activities slow the process and require oil and gas developers conducting operations in multiple field locations to navigate the inconsistent and confusing local requirements.

Recommendation 9.3: CEO study of NEPA's interaction with state "mini-NEPAs."

Williams supports this study as there are several areas in which the states and NEPA seem to overlap with respect to the environmental evaluation process. To the extent found, these overlaps and duplications should be minimized or removed altogether. As noted in the comment to Recommendation 9.1, overlapping jurisdiction is a serious concern that should be addressed in the context of both state "mini-NEPAs" and other regulations touching on oil and gas development, such as regulation imposed by state agencies implementing the Clean Water Act and Clean Air Act and state oil and gas conservation commissions.

Thank you for the opportunity to comment on the Task Force recommendations. We hope that improvements to the NEPA process will encourage a reasonable and efficient approach to development of oil and gas from the public lands. Working together, we can assure that the objectives of NEPA are achieved with a common-sense approach that allows everyone to meet their ultimate goals.

Sincerely,



Rob Bleil
Environmental Spec Sr - ES
Parachute District
Compliance Team Lead